THOMAS GREGORY STEPHENS & ORS.

v.

WEST AUSTRALIAN NEWSPAPERS LIMITED

HIGH COURT, AUSTRALIA
MASON CJ,BRENNAN, DEANE, DAWSON, TOOHEY,
GAUDRON AND McHUGH JJ
[F.C.94/040]
12 OCTOBER 1994

TORT: Defamation - Freedom of publication - Whether done recklessly and not caring for the truth or falsity of the statement - Whether publication reasonable - Whether proposed amendments to statement of defence bad in law.

The six plaintiffs were at all material times members of the Legislative Council of Western Australia and of its Standing Committee on Goverment Agencies (the committee). On 5 October 1992, the plaintiffs commenced an action for damages for defamation against the defendant, the publisher of the West Australian Newspaper. The plaintiffs claim that three articles published in the newspaper were defamatory of them. The subject of the articles was on interstate and overseas trip of 22 days undertaken by the plaintiffs as the members of the committee.

The defendant proposed to further amend its defence. This was taken up by way of case stated pursuant to s. 18 of the Judiciary Act 1903 to consider whether the proposed amendments were bad in law or not.

Held:

[1] The implied freedom would afford a defence in law in respect of the three publications complained of if the defendant was unaware of the falsity of the material published and did not publish the material recklessly, that is, not caring whether the material was true or false, and if the publications were reasonable in the circumstances. However, paragraph 20A of the further amended defence does not allege fulfilment of these conditions, no doubt because the pleader proceeded on the footing that the onus in respect of honest belief and reckless disregard for truth or untruth rested on the plaintiff, a view which is rejected.

[2] It is unnecessary to allege a duty on the part of the defendant to publish the matter complained of to its readers. However, that does not mean the defence pleaded is not a good defence in law. It merely means that the defendant has alleged something which is unnecessary or irrelevant.

[Questions reserved answered accordingly].

Cases referred to:

Theophanous v. The Herald & Weekly Times Limited (Unreported, 12 October, 1994) ***(foll)***
Nationwide News Pty. Ltd. v. Wills [1992] 177 CLR 1 ***(refd)***
Australian Capital Television Pty. Ltd. v. The Commonwealth [1992] 177 CLR 106 ***(refd)***
Western Australian v. Wilsmore [1982] 149 CLR 79 ***(refd)***
Clines v. Australian Consolidated Pres Ltd. [1966] 67 SR (NSW) 364 ***(refd)***
West Australian Newspapers Ltd. v. Bridge (979) 141 CLR 535 ***(refd)***
Guise v. Kouvelis [1947] 74 CLR 102 ***(refd)***
London Association for Protection of Trade v. Greenlands Limited [1916] 2 AC ***(refd)***
Davis v. Shepstone [1886] 11 App Cas 187 ***(refd)***

Borrocks v. Lowe [1975] AC 135 ***(refd)***
Telegraph Newspaper Co., Ltd. v. Bedford [1934] 50 CLR 632 ***(refd)***
Smith's Newspaper Ltd. v. Becker [1932] 47 CLR 279 ***(refd)***
Loveday v. Sun Newspapers Ltd. [1938] 59 CLR 503 ***(refd)***
Lang v. Willis [1934] 52 CLR 637 91938) 59 CLKR 503 ***(refd)***
Webb v. Times Publishing Co., Ltd. [1960] 2 QB 535 ***(refd)***
Campbell v. Spottiswoode, [1863] 3B & S 769 ***(refd)***
Globe & Mail Ltd. v. Boland [1960] 22 DLR (2d) 277 ***(refd)***
Wake v. John Fairfax & Sons Ltd. [1973] 1 NSWLR 43 ***(refd)***
Bell v. Byrne [1811] 13 East 554 ***(refd)***
Perera (M.G.) v. Peiris [1949] AC 1 ***(refd)***
Allbutt v. General Council of Medical Education and Registration [1889] 23 QBD 400 ***(refd)***
Purcell v. Sowler [1877] 2 CPD ***(refd)***
Chapman v. Ellesmere [1932] 2 KB ***(refd)***
Globe & Mail Ltd. v. Boland [1960] 22 DLR (2d) ***(refd)***
Dunford Publicity v. News Media [1971] NZLR 961 ***(refd)***
Australian Consolidated press Ltd. v. Uren [1966] 117 CLR 185 ***(refd)***
Calwell v. Ipec Australia Ltd. [1975] 135 CLR 321 ***(refd)***
Dunford Publicity v. News Media [1971] NZLR 961 ***(refd)***
Smith v. Streatfeild [1913] 3 KB 764 ***(refd)***
Webb v. Bloch [1928] 41 CLR 331 ***(refd)***
McKernan v. Fraser [1931] 46 CLR 343 ***(refd)***
Longdon-Griffiths v. Smith [1951] 1 KB 295 ***(refd)***
Egger v. Viscount Chelmsford [1965] 1 QB 248 ***(refd)***
Mowlds v. Fergusson [1939] 40 SR (NSW) 311 ***(refd)***
Howe & McColough v. Less [1910] 11 CLR v. Less [1910] 11 CLR 361 ***(refd)***
Adam v. Ward [1917] AC 309 ***(refd)***
Allbutt v. General Council of Medical Education and Registration [1889] 23 QBD 400 ***(refd)***
Attorney-General v. Times Newspapers [1974] AC 273 ***(refd)***

Legislation referred to:
Judiciary Act 1903, s. 18
The Constitution Act (W.A) 1978, s. 73

For the plaintiffs - Clayton Utz
For the defendant - Parker & Parker
For the Interveners - Australian Government Solicitor; P.A. Panegyres, Crown Solicitor for Western Australia; B.M. Selway, Crown Solicitor for South Australia; H.K. Roberts, Crown Solicitor for New South Wales; D.M.I. Dreier, Solicitor for the Northern Territory; K.M. O'Shea, Crown Solicitor for Queensland; R.C. Beazley, Victorian Government Solicitor

JUDGMENT

Mason CJ, Toohey and Gaudron JJ:

This is a case stated by Mason C.J. pursuant to s. 18 of the Judiciary Act 1903 (Cth). The six plaintiffs were at all material times members of the Legislative Council of Western Australia and of its Standing Committee on Government Agencies ("the Committee"). On 5 October 1992, the plaintiffs commenced an action for damages for defamation against the defendant, the publisher of the *West Australian* newspaper. In this action the plaintiffs claim that three articles published in the newspaper were defamatory of them. The subject of the articles was an interstate and overseas trip of 22 days undertaken by the plaintiffs as the members of the Committee. The first article was published in the newspaper on 29 June 1992. It was in these terms:

MPs' Trip a Mammoth Junket: Lockyer

A Senior Liberal MP wants Premier Carmen Lawrence to recall a six-member Legislative Council committee which has gone overseas for a month.

Pastoral and Mining MLC Phil Lockyer said the six members of the government agencies committee had gone without the knowledge of Parliament.

'It is a junket of mammoth proportions' Mr Lockyer said yesterday.

'They've gone in secret hoping no one would find out about it and this is nothing but a rort which is costing taxpayers thousands of dollars.'

'Council President Clive Griffiths has a lot of answering to do. I'm absolutely staggered that he even allowed it, especially in this economic climate.'

'If the electors knew what was up, they'd be appalled.'

Mr Lockyer said no MP should be going anywhere when there were so many people out of work in WA.

The MPs, who have gone to New Zealand, the US and Canada, are Liberals George Cash, Norman Moore and Barry House and Labor MPs Tom Stephens, John Halden and Doug Wenn.

Their committee examines the workings of the 800 or so Government agencies which don't come under direct control of a minister.

Mr Lockyer said he could not believe the MPs could be swanning around the world when their reason for the trip never came up in parliament.

He questioned why they had to go anywhere to examine WA agencies and called on Mr Griffiths to release complete details of the 'junket' and the costs involved.

Mr Lockyer said he knew he would cop flak from Liberals but the affair made him cringe with embarrassment.

The second article was published on 30 June 1992 under the heading "Lawrence Won't Call MLCs Home". This article reported that the Premier rejected a plea by Mr Lockyer for the recall of the Committee and that the Premier was of the view that it was for Parliament, not for the government of the day, to look at the operations of parliamentary committees. The article restated Mr Lockyer's claim that "six members of the government agencies committee had gone on a junket at taxpayers' expense without Parliament's knowledge" and named the plaintiffs as well as stating that they left Perth on 20 June for Sydney, Canberra, Melbourne, New Zealand, the United States and Canada and would return on 12 July. The article reported Mr Lockyer as saying that "he was staggered that Legislative Council President Clive Griffiths approved the trip in the current economic climate" and that he had heard of the trip "from a Parliament House steward". The article also reported that Mr Griffiths had said, evidently on radio, that the Committee had been authorized to inquire into the purpose, finance, accountability, expense, nature, administrative control and methods of State government agencies and that it was answerable to the Legislative Council. The article also reported that the Committee had put forward a budget for the whole of its operations and that this had been approved by Parliament. The trip had also been approved by the chairmen of the Legislative Council's five standing committees. According to Mr. Griffiths, the trip could play an important part in developing ideas for legislation or a code of conduct for statutory corporations. The article further reported that a spokesman for Mr Griffiths said later that no estimate had been made of the cost of the trip.

The third article was published in the newspaper on 3 September 1992 under the heading "Hallahan goes first class to convention". This article was mainly concerned with an overseas trip undertaken by Kay Hallahan, who was the Minister for Education and the Arts. The only reference in the article to the plaintiffs was contained in the last three paragraphs of the article which were as follows:

> Liberal MLC Phil Lockyer, who branded both Mrs Hallahan's and Ms Anderson's trips and the 22-day trip of an Upper House committee headed by Liberal MP Norman Moore to Canada and the US as junkets and accused all involved of sneaking off in secret, is expected to introduce changes to MPs' and ministers' travel today.
>
> Mr Lockyer wants the costs of all travel more than $5000 either inside or outside Australia to be tabled.
>
> He also wants itineraries, projected costs, reasons for travel and benefits to be gained from that travel tabled.

Paragraph 20A of the further amended defence filed by the defendant is in these terms:

> (a) at the time of the publication of the articles complained of each of the plaintiffs was an elected member of the Legislative Council of Western Australia;
>
> (b) the articles complained of related to the plaintiffs in their capacity as elected members of the Legislative Council of Western Australia and to the performance by the plaintiffs of their functions and duties as members of that Legislative Council;
>
> (c) the articles complained of related to the suitability and qualification of the plaintiffs to hold and to continue to hold public office as members of the Legislative Council of Western Australia;
>
> (d) the articles complained of were published predominantly to persons who were enrolled as electors of the Legislative Council of Western Australia;
>
> (e) the articles complained of related to matter which was relevant to an elector in determining whether he or she should cast his or her vote for any of the plaintiffs and for any of the other candidates for the Legislative Council or Legislative Assembly of the Western Australian Parliament;
>
> (f) the publication of the articles complained of and the mode, manner and extent of publication were reasonable in the circumstances.
>
> In the premises, the newspaper articles complained of were published pursuant to a freedom guaranteed by the Commonwealth Constitution and the Constitution Act 1889 (WA) and are therefore not actionable.

Paragraph 20B of the further amended defence is in these terms:

> In further answer to the whole of the statement of claim, the defendant says that the newspaper articles complained of were published on occasions of qualified privilege.
>
> **Particulars**
>
> (a) each of the plaintiffs was at the time of the publication of the articles complained of an elected member of the Legislative Council of Western Australia;

(b) the articles complained of related to the plaintiffs in their capacity as elected members of the Legislative Council of Western Australia and to the performance by the plaintiffs of their functions and duties as members of that Legislative Council;

(c) the articles complained of related to the suitability and qualification of the plaintiffs to hold and to continue to hold public office as members of the Legislative Council of Western Australia;

(d) the publication by the defendant of the articles complained of was substantially confined to the State of Western Australia;

(e) publication in the West Australian of the articles complained of was one of the most reasonably practicable modes of effectively communicating in writing with the electors in the State of Western Australia;

(f) the articles complained of were composed by a reporter employed by the defendant who was at the time of the publication of the articles complained of an enrolled elector for the Legislative Council and Legislative Assembly of Western Australia;

(g) the articles complained of were edited by persons who were employed by the defendant and who were qualified as electors of the Legislative Council and Legislative Assembly of Western Australia at the time of the publication of the articles complained of;

(h) by reason of the matters particularised in paragraphs (a)-(c) above, the articles complained of related to matters of public interest;

(i) the publication of the articles complained of and the mode, manner and extent of publication were reasonable in the circumstances;

(j) the articles complained of were published predominantly to persons who were enrolled as electors of the Legislative Council of Western Australia;

(k) by reason of the Commonwealth Constitution and the Constitution Act 1889 (WA) each elector of the Legislative Council and Legislative Assembly of Western Australia was entitled to exercise a fully informed choice in casting his or her vote for members of the Council and Assembly;

(l) the articles complained of related to matters which were relevant to electors in determining whether they should cast a vote for any of the plaintiffs and for any of the other candidates for the Legislative Council and Legislative Assembly of the Western Australian Parliament;

(m) the articles complained of related to possible misconduct or misfeasance in public office by elected members of the parliament of Western Australia;

(n) the matters complained of related to the spending of public moneys and the accountability of members of Parliament in respect of the spending of public money;

(o) in the premises, the defendant had an interest and the readers of the West Australian had a reciprocal and corresponding interest (or apparent interest) in the matters complained of;

(p) in the premises, the defendant had a duty to publish the matters complained of to its readers who had an interest (or an apparent interest) in receiving such matters.

In these circumstances, the questions stated for the consideration of the Full Court are:

(a) Is the defence pleaded in paragraph 20A of the further amended defence bad in law?

(b) Is the defence pleaded in paragraph 20B of the further amended defence bad in law?

As many of the issues germane to the questions stated have been dealt with in our reasons for judgment in *Theophanous v. The Herald & Weekly Times Limited* unreported, 12 October 1994, judgment in which is published contemporaneously with the decision in this case, we can dispose of the present case more briefly.

The plaintiffs' argument does not challenge that there is an implied freedom of communication in the constitutional establishment of representative democracy and government at the State, as well as the Federal, level. The plaintiffs acknowledge that the question whether, in relation to its supposed application to the matter complained of in the present case, the freedom derives from the Commonwealth Constitution or the State Constitution or both is perhaps not of great importance. That is because, in this case, as in *Theophanous*, the critical question is as to the scope of, and the limitations upon, the freedom from whatever source it derives.

However, it is desirable that we should state our view that there is an implied freedom of communication deriving both from the Commonwealth Constitution and from the State Constitution which applies in the present case. First, we consider that the freedom of communication implied in the Commonwealth Constitution extends to public discussion of the performance, conduct and fitness for office of members of a State legislature.

A majority of the justices in *Nationwide News Pty. Ltd. v. Wills* [1992] 177 CLR 1 and *Australian Capital Television Pty. Ltd. v. The Commonwealth* [1992] 177 CLR 106 was of opinion that the freedom of communication as to political matters implied in the Commonwealth Constitution extended to all political discussion, including discussion of political matters relating to government at State level (*National News* [1992] 177 CLR at 75-76 per Deane and Toohey JJ.; *Australian Capital Television* [1992] 177 CLR at 142 per Mason C.J., 168-169 per Deane and Toohey JJ., 216-217 per Gaudron J). The reasons for that conclusion are set out in the judgments in those cases and in our judgment in *Theophanous*. The implication of freedom of communication in the Commonwealth Constitution was based on the provisions and structure of the Constitution, particularly the concept of representative democracy and government for which the Constitution provides, principally by ss.7 and 24. The implication was made as a matter of necessity in order to protect the efficacious working of the system of representative government mandated by the Constitution.

The basis of that implication has its counterpart in the Constitution of Western Australia. The legislature of Western Australia consists of the Sovereign, the Legislative Council and the Legislative Assembly (Constitution Act 1889 (W.A.), s. 2). Both the Council and the Assembly are popularly elected, the members of the Council being elected for electoral regions (Constitution Acts Amendment Act 1899 (W.A.) ss. 5, 6). Election to the Legislative Council is for a term of four years *ibid*., sub-ss. 8(2) and (3). The persons who are the electors of members of the Legislative Assembly are also the electors of members of the Legislative Council *ibid*., s. 15.

Section 73 of the Constitution Act (W.A.) provides that the legislature of the State "shall have full power and authority, from time to time, by any Act, to repeal or alter any of the provisions of this Act". However, it is not lawful to present to the Governor for assent by the Queen (s. 73(1), first proviso; see *Western Australia v. Wilsmore* [1982] 149 CLR 79 esp. at 93-98 per Wilson J.):

> any Bill by which any change in the Constitution of the Legislative Council or of the Legislative Assembly shall be effected, unless the second and third readings of such Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly respectively.

Section 73(2) was inserted into the Constitution by an amendment enacted in 1978. That sub-section further restricts the capacity of the legislature to enact a Bill which expressly or impliedly provides for the abolition of either the Council or the Assembly (s. 73(2) (b)) or provides that either House "shall be composed of members other than members chosen directly by the people" (s. 73(2) (c)). The sub-section requires that such a Bill should not be presented for assent unless "the second and third readings of the Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly, respectively" (s. 73(2) (f)) and the Bill has been approved by a majority of electors of the State at a referendum (s. 73(2) (g); see also s. 73(2) (e) and s. 73(3), (4), (5) and (6)).

We do not consider that s. 73 provides a foundation for any suggestion that the Western Australian Constitution contemplates the possibility that it will be amended in such a way that representative democracy will be abolished. On the contrary, s. 73(2) was plainly enacted with the object of reinforcing representative democracy and placing a further constitutional impediment in the way of any attempt to weaken representative democracy. And, so long, at least, as the Western Australian Constitution continues to provide for a representative democracy in which the members of the legislature are "directly chosen by the people", a freedom of communication must necessarily be implied in that Constitution, just as it is implied in the Commonwealth Constitution, in order to protect the efficacious working of representative democracy and government.

That freedom of communication, like its counterpart in the Commonwealth Constitution, extends to criticism of the conduct, performance and fitness for office of a member of Parliament. As we pointed out in *Theophanous* at 7:

> criticism of the views, performance and capacity of a member of Parliament and of the member's fitness for public office ... is at the very centre of the freedom of political discussion.

It follows that, in accordance with our reasons for judgment in *Theophanous*, the implied freedom would afford a defence in law in respect of the three publications complained of if the defendant was unaware of the falsity of the material published and did not publish the material recklessly, that is, not caring whether the material was true or false, and if the publications were reasonable in the circumstances. However, par.20A of the further amended defence does not allege fulfilment of these conditions, no doubt because the pleader proceeded on the footing that the onus in respect of honest belief and reckless disregard for truth or untruth rested on the plaintiff, a view which we rejected in *Theophanous*. Accordingly, the defence pleaded in par.20A is bad in law.

a There is no need for us to do more than refer to our discussion in *Theophanous* of the relationship between the constitutional implication and the common law defence of qualified privilege. In the light of that discussion it is unnecessary to allege a *duty* on the part of the defendant to publish the matter complained of to its readers. However, that does not mean that the defence pleaded is not a good defence in law. It merely means that the defendant had alleged something which is
b unnecessary or irrelevant.

In the result, we would answer the questions stated:

(a) Yes.

(b) No.

c **Brennan J:**

Each of the plaintiffs was at all relevant times a member of the Legislative Council of Western Australia and a member of its Standing Committee on Government Agencies. The plaintiffs issued a writ against West Australian Newspapers Limited, the defendant, claiming damages for defamation in respect of three articles published in the *West Australian* newspaper on 29 June 1992, 30 June 1992 and 3
d September 1992 respectively. The text of the articles is set out in the reasons for judgment of Mason C.J., Toohey and Gaudron JJ. The defendant delivered a defence pleading, *inter alia*, that the articles complained of were published pursuant to a freedom guaranteed by the Commonwealth Constitution and the Constitution Act 1889 (W.A.) (par.20A) and that the articles were published on occasions of qualified privilege, particulars of which were given (par.20B). The matter having been
e removed into this Court, the Chief Justice stated a case reserving for the opinion of the Full Court the questions (i) whether par.20A of the defendant's defence is bad in law and (ii) whether par.20B is bad in law. The first question raises issues of constitutional law. The second question is of a different kind. Paragraph 20B in terms pleads that the articles were published on an occasion of qualified privilege. In form, that is a good plea but the second question is not directed to a mere issue
f of form. It is not possible to answer on a case stated, or on a demurrer, whether the occasion on which defamatory matter was published was an occasion of qualified privilege. That is a question best left for the trial Judge (*Clines v. Australian Consolidated Press Ltd.* [1966] 67 SR(NSW) 364 at 379, 383, 394, 395) but, as the question has been asked and as it is addressed in other judgments, I shall attempt to formulate an answer.

g *Constitutional Freedom: Paragraph 20A*

In *Theophanous v. The Herald & Weekly Times Limited* unreported, 12 October 1994 I have stated the nature, scope and effect of the implication in the Commonwealth Constitution affecting the freedom to discuss government, government institutions and political matters. Although the constitutional implication is capable
h of limiting the exercise of the legislative power of the Parliaments of the States, that implication is to be found in provisions that prescribe the structure of the government of the Commonwealth, not the structure of the government of the States. That implication effects a qualified (not absolute) freedom to discuss government, governmental institutions and political matters in order to protect the structure of the government of the Commonwealth. But the publication of the material com-
i plained of in these proceedings touching the performance by members of the

Western Australian Parliament of their official functions is irrelevant to the government of the Commonwealth and is unaffected by the implication.

However, the Constitution Act provides for both Houses of the Parliament of Western Australia to be elected by those possessing the franchise qualifications. Section 73(2)(c), inserted by amendment in 1978 (Acts Amendment (Constitution) Act 1978 (W.A.), s .6), entrenches in the Constitution Act the requirement that the Legislative Council and the Legislative Assembly be composed of members chosen directly by the people. This requirement is drawn in terms similar to those found in ss.7 and 24 of the Commonwealth Constitution from which the implication that effects a constitutional freedom to discuss government, governmental institutions and political matters is substantially derived. By parity of reasoning, a similar implication can be drawn from the Constitution Act with respect to the system of government of Western Australia therein prescribed.

However, for the reasons which I have given in *Theophanous*, such an implication does not affect the common law, nor does it affect the provisions of the Criminal Code relevant to the present case. I would therefore answer Question (i): paragraph 20A is bad in law.

The Criminal Code

In Western Australia, the Criminal Code does not furnish a code of civil defamation law. Nevertheless, by declaring the publication of defamatory matter to be lawful in particular prescribed cases, it modifies the common law in those cases: *West Australian Newspapers Ltd. v. Bridge* [1979] 141 CLR 535 at 54C, 543-545. The three sections which provide statutory defences to a civil action for libel or slander are ss. 354 ("Protection: Reports of matters of public interest"), 355 ("Protection: Fair Comment") and 356 ("Protection: Truth") In *West Australian Newspaper Ltd. v. Bridge*, Jacobs J., (*ibid*. at 544) expressed the opinion that s. 5 of the Criminal Code Act 1913 (W.A.) prevented the statutory defence of "truth and public benefit" from having any practical effect, since the common law defence of truth simplicitor remained. It is not necessary in this case to reconsider this proposition. None of these provisions affects the availability of a defence of qualified privilege in the present case, but s. 357 ("Qualified Protection: Excuse") should be mentioned. Although s.357 of the Code provides "a lawful excuse" for the publication of defamatory matter in circumstances which correspond largely with the circumstances in which a defence of qualified privilege is available at common law, the excuse provided by s. 357 is relevant only to criminal, not to civil, liability (*West Australian Newspapers Ltd. v. Bridge, ibid.* at 540-541, 543-545). Liability for the publication in Western Australia of defamatory matter on an occasion of qualified privilege is governed for civil purposes by the common law. It is by reference to the common law of qualified privilege that the question whether the plea in par.20B of the defence is bad in law must be determined.

Qualified Privilege: Paragraph 20B

The three articles complained of by the plaintiffs make adverse comments on the overseas travelling and agenda of the members of the Standing Committee on Government Agencies. The articles clearly contain comment to the effect that the members of the Standing Committee had gone on a trip of self-indulgence without public benefit (a "junket") but they also contain, in my view, a significant allegation

of fact that a jury would be entitled to regard as defamatory, namely, the allegation, said to have been made by "MLC Phil Lockyer", that the members of the Committee "had gone [overseas] without the knowledge of parliament". The second article repeated substantially the same allegation but it contained a report that the president of the Legislative Council had stated that the Committee "was answerable to the Legislative Council ... and had put forward a budget for the whole of its operations and this was included in papers presented to parliament and approved by it". The report added that "the trip had been approved by the chairmen of the Legislative Council's five standing committees". However, in the third article the original allegation was recalled. It stated that Mr Lockyer had "accused all involved of sneaking off in secret". The articles are open to the interpretation that Mr Lockyer alleged that parliament had no knowledge of and had not approved the incurring of expenditure by members of the Standing Committee in making the trip. Some such allegation of fact was clearly a substantial ground of the criticism contained in the comments. So far as the articles contain such an allegation of fact, it is a live question whether the publication of those articles occurred on occasions of qualified privilege. The publication of such an allegation finds no protection in the defence of fair comment. In *Davis v. Shepstone* [1886] 11 App Cas 187 at 190, Lord Herschell L.C. who delivered the opinion of the Privy Council, said:

> There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.

Here the articles state or may be found to imply facts that are defamatory of the plaintiffs and par.20B pleads qualified privilege as a defence to the plaintiffs' statement of claim so far as the plaintiffs' claim is based on the publication of such facts.

The basic rule of qualified privilege was stated by Parke B. in *Toogood v. Spyring* [1834] 1 C M & 181 at 193 [149 ER 1044 at 1049-1050]:

> In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

The occasion of privilege which "prevents the inference of malice" depends on the subject and circumstances of the publication, not on the state of mind of the defendant. If the defamatory matter be published on a privileged occasion, the onus shifts to the plaintiff to prove malice in the defendant. If malice be proved, the privilege ceases to be an effective defence (*Smith v. Streatfeild* [1913] 3 KB 764 at

769-770), but see the consideration of this case below. Paragraph 20B pleads the privilege of the occasions of publication of the three articles. If it be a good plea, it will be for the plaintiffs to plead malice on the part of the defendant if they should be so advised. As to the relevance of a plea of malice on the part of Mr. Lockyer, see below.

The law of qualified privilege seeks to balance, or to reconcile, the law's protection of personal reputation and freedom of speech that is appropriate in a free society. There is a public interest in both objectives and the law must provide a nice adjustment in regulating the competition between them. In *Horrocks v. Lowe* [1975] AC 135 at 149 Lord Diplock said:

> The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has ... to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. With some exceptions ... the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit - the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege.

The material inquiry in a case where qualified privilege is pleaded is whether, to take the words of Parke B. in *Toogood v. Spyring*, the defamatory matter was published "in the discharge of some public or private duty, whether legal or moral, or in the conduct of [the publisher's] own affairs, in matters where his interest is concerned". If that test be satisfied, the publication is protected "for the common convenience and welfare of society" ([1834] 1 C M & at 193 [149 ER at 1050]).

This test has been generally accepted as correct (*Howe & McColough v. Lees* [1910] 11 CLR 361 at 367-368, 376, 386; *Macintosh v. Dun* [1908] AC 390 at 398-399; *London Association for Protection of Trade v. Greenlands Limited* [1916] 2 AC 15 at 22, 28), the "duty" of which Parke B. speaks being understood not necessarily as a legally enforceable duty but at least a social or moral duty that would be recognized as such by "people of ordinary intelligence and moral principle" (*Stuart v. Bell* [1891] 2 QB 341 at 350; see also *Adam v. Ward* [1917] AC 309 at 334; *Telegraph Newspaper Co. Ltd. v. Bedford* [1934] 50 CLR 632 at 654; *Molds v. Fergusson* [1940] 64 CLR 206 at 220; *Guise v. Kouvelis* [1947] 74 CLR 102 at 113-114). In *Adam v. Ward*, Lord Atkinson said [1917] AC 309 at 334:

> It was not disputed ... that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

The test expressed by Parke B. in *Toogood v. Spyring* is expressed in broad terms, flexible enough to be adapted from time to time to "the varying conditions of society" *(Wason v. Walter* [1868] LR 4 QB 73 at 93; see also *Allbutt v. General Council of*

Medical Education and Registration [1889] 23 QBD 400 at 410). But, as Dixon J. said in *Guise v. Kouvelis* [1947] 74 CLR 102 at 116:

> Whatever advantages may be found in 'broad' or 'flexible' categories or tests of responsibility or immunity, they are not felt by a Judge who wants to be guided in his decision. But the very width of the principles governing qualified privilege for defamation makes it more necessary, in deciding how they apply, to make a close scrutiny of the circumstances of the case, of the situation of the parties, of the relations of all concerned and of the events leading up to and surrounding the publication.

His Honour cited with approval *ibid*. at 117 Lord Loreburn's approach in *Baird v. Wallace-James* [1916] 85 LJ PC 193 at 198:

> In considering the question whether the occasion was an occasion of privilege the Court will regard the alleged libel, and will examine by whom it was published, to whom it was published, when, why, and in what circumstances it was published, and will see whether these things establish a relation between the parties which gives a social or moral right or duty.

It is a question of law whether an occasion of qualified privilege arises (*Adam v. Ward* [1917] AC at 318, 321, 332, 340, 349-350) but that question is determined by considering "every circumstance associated with the origin and publication of the defamatory matter" distinguishing between "matter which would be solely evidence of malice, and matter which would show that the occasion itself was outside the area of protection": per Lord Buckmaster L.C. in *London Association for Protection of Trade v. Greenlands Limited* [1916] 2 AC 15 at 23; see also *Blackshaw v. Lord* [1984] QB 1 at 26.

In order to determine whether the matter complained of was published on an occasion of qualified privilege, it is necessary to apprehend the defamatory sense of the matter published *Telegraph Newspaper Co. Ltd. v. Bedford* [1934] 50 CLR at 648. The stated case does not annex the statement of claim nor reproduce the pleaded imputations. Nevertheless, the case stated book contains the statement of claim which sets out the imputations which the plaintiffs allege to be inherent in the ordinary and natural meaning of the words of the respective articles. I shall assume the defamatory sense of the articles to be as pleaded in the imputations contained in the statement of claim. Those imputations are that each of the plaintiffs -

(a) participated in the unauthorized use of public moneys;

(b) dishonestly procured the use of public moneys for an improper purpose;

(c) dishonestly concealed from Parliament the expenditure of public moneys;

(d) acted in breach of his obligation as a member of the Legislative Council not to deceive such Council.

The sting of the defamatory matter is thus the imputation of dishonesty in the procurement and expenditure of public moneys and deception (by concealment) of the Legislative Council on the part of members of the Legislative Council.

The other circumstances relevant to the question of the privilege of the occasion of publication are pleaded in the particulars contained in par.20B. They read as follows:

Particulars

(a) each of the plaintiffs was at the time of the publication of the articles complained of an elected member of the Legislative Council of Western Australia;

(b) the articles complained of related to the plaintiffs in their capacity as elected members of the Legislative Council of Western Australia and to the performance by the plaintiffs of their functions and duties as members of that Legislative Council;

(c) the articles complained of related to the suitability and qualification of the plaintiffs to hold and to continue to hold public office as members of the Legislative Council of Western Australia;

(d) the publication by the defendant of the articles complained of was substantially confined to the State of Western Australia;

(e) publication in the West Australian of the articles complained of was one of the most reasonably practicable modes of effectively communicating in writing with the electors in the State of Western Australia;

(f) the articles complained of were composed by a reporter employed by the defendant who was at the time of the publication of the articles complained of an enrolled elector for the Legislative Council and Legislative Assembly of Western Australia;

(g) the articles complained of were edited by persons who were employed by the defendant and who were qualified as electors of the Legislative Council and Legislative Assembly of Western Australia at the time of the publication of the articles complained of;

(h) by reason of the matters particularised in paragraphs (a)-(c) above, the articles complained of related to matters of public interest;

(i) the publication of the articles complained of and the mode, manner and extent of publication were reasonable in the circumstances;

(j) the articles complained of were published predominantly to persons who were enrolled as electors of the Legislative Council of Western Australia;

(k) by reason of the Commonwealth Constitution and the Constitution Act 1889 (WA) each elector of the Legislative Council and Legislative Assembly of Western Australia was entitled to exercise a fully informed choice in casting his or her vote for members of the Council and Assembly;

(l) the articles complained of related to matters which were relevant to electors in determining whether they should cast a vote for any of the plaintiffs and for any of the other candidates for the Legislative Council and Legislative Assembly of the Western Australian Parliament;

(m) the articles complained of related to possible misconduct or misfeasance in public office by elected members of the Parliament of Western Australia;

(n) the matters complained of related to the spending of public moneys and the accountability of members of Parliament in respect of the spending of public money;

(o) in the premises, the defendant had an interest and the readers of the West Australian had a reciprocal and corresponding interest (or apparent interest) in the matters complained of;

(p) in the premises, the defendant had a duty to publish the matters complained of to its readers who had an interest (or an apparent interest) in receiving such matters.

Curiously, these particulars do not allege that Mr Lockyer, to whom authorship of the attack on the plaintiffs is attributed, is a member of the Legislative Council or that he in fact made the remarks attributed to him. Nor does par.20B plead that the articles fairly or accurately report what Mr Lockyer said. Instead, par.20B pleads that the articles were "composed" and "edited" by employees of the defendant. It may be that the pleader assumed that the authorship of Mr Lockyer, MLC and the fair and accurate reporting of what he said would be taken to be implicitly alleged in the plea of qualified privilege for that plea could not possibly survive if the articles did not fairly and accurately report the remarks of Mr Lockyer, MLC (*Morosi v. Mirror Newspapers Ltd.* [1977] 2 NSWLR 749 at 780; *John Fairfax & Sons Ltd. v. Punch* [1980] 31 ALR 624 at 634; *Blackshaw v. Lord* [1984] QB at 20). The omission of these particulars leaves the plea in par.20B without support, for there could be no social of moral duty to publish what Mr Lockyer, MLC said if he did not say it. Nor could there be any such duty if Mr Lockyer was not a member of the Legislative Council, as he was said to be. However, to dispose of the second question in the case stated on the ground that the particulars failed to plead that Mr Lockyer, MLC said what was attributed to him would not decide the more important question of substance that was argued by Counsel.

The central point in issue is the practical availability of the defence of qualified privilege to newspapers to publish reports of allegations of misconduct of the kind complained of by the plaintiffs. To decide that question, I shall assume that the facts pleaded in the particulars are supplemented by the facts that Mr Lockyer was a member of the Legislative Council and that he made the remarks attributed to him in the three articles complained of.

In principle, the defence of qualified privilege is available to a newspaper defendant as it is to any other defendant who publishes defamatory matter (*Arnold v. The King-Emperor* [1914] 30 TLR 462 at 468; *Perera (M.G.) v. Peiris* [1949] AC 1 at 21-22; *Morosi v. Mirror Newspapers Ltd.* [1977] 2 NSWLR 749 at 778; *Blackshaw v. Lord* [1984] QB 1 at 25). But a newspaper defendant is often unable to satisfy the requirements or elements of the defence of qualified privilege. Paragraph 20B is intended to raise for consideration the requirements of that defence "in the varying conditions of society", the contention being that the circumstances alleged in the particulars establish the reciprocal interest and duty pleaded in particulars (o) and (p). As Evatt J. pointed out in *Telegraph Newspaper Co. Ltd. v. Bedford* [1934] 50 CLR 632 at 657, the "guiding principle" of reciprocal duty or interest, which is necessarily broad and general, is based solely on public utility. When a publication is said to have been made in discharge of a social or moral duty, the occasion is privileged only if it be in "the interest of the community", "for the welfare of society" or "for the good of society in general" - these phrases being synonyms for Baron Parke's "for the common convenience and welfare of society" (*ibid.* at 656, 662). When it is said that a publication is privileged because it is made in the public interest, "interest" is not to be equated with curiosity (*Howe & McColough v. Lees* [1910] 11 CLR at 398). It is used in a non-technical sense to mean that the publication is made for the welfare of society (*ibid.* at 377). As *Bedford's Case* illustrates, a publication defamatory of the plaintiff is not made on an occasion of qualified privilege merely because the person or persons to whom it is made - in that case, the readers of the newspaper - were interested in the subject matter. And, if the publication is made to protect an interest of the person making the defamatory

statement, the publication is protected only if it be made to "a person who, if the defamatory matter be true, may reasonably be expected to be of service in the protection of the interest". (The effect of the American Restatement adopted by Dixon J. in *Mowlds v. Fergusson* [1940] 64 CLR at 215). The common law places a higher value on the protection of personal reputation than on the satisfaction of curiosity or on the dissemination of defamatory material which is not reasonably calculated to be of service in protection of the interests of the person making the defamatory statement.

These general principles must be applied to varying forms of articles containing defamatory facts. A newspaper, or other medium of mass communication, may publish a fact defamatory of a plaintiff in any of three forms, namely, as its own statement of the fact, as a report of a statement made by a third party, or as a letter to the editor or other communication from a contributor published as such.

A newspaper publishes its own defamatory allegation

Where a newspaper publishes a defamatory fact as its own statement of the fact, it can usually avoid liability only by establishing the truth of what it has stated; otherwise the plaintiff is entitled to have a verdict vindicating his reputation. A newspaper, if it were to publish defamatory matter in a public response to an attack upon it in the Parliament or the public press, could claim privilege in defending its own interest, but otherwise it would be an exceptional case in which a newspaper would be under a social or moral duty to publish to its readers generally some matter defamatory of an individual. Thus, in *Smith's Newspapers Ltd. v. Becker* [1932] 47 CLR 279, the plaintiff, a Doctor of Medicine of a German University who was not registered to practise in this country but who practised medicine in South Australia, sued the defendant newspaper for the publication of an article describing him as a German quack and a menace to society. The plea of qualified privilege failed. Starke J. said *ibid*. at 291:

> The statements made in the newspaper were said to have been made by the defendants in the discharge of their duty, or on a subject matter in which the defendants and their readers had a common interest, and therefore to have been made on a privileged occasion, and, in the absence of malice, not actionable. All that need be said as to this contention is that the occasion was not privileged; the defendants had no duty to attack the personal and professional reputation of the plaintiff and publish it to the world at large.

And Evatt J. said *ibid*. at 304:

> In the present case the defence of qualified privilege was not applicable. ... There was no community of interest between the defendants and the general body of their readers which gave rise to any occasion for the communication to them of the imputations against the plaintiff. Communications of genuinely entertained opinions and suspicions to the proper State or professional authorities, by the defendants or any other person, might have given rise to an entirely different situation. But, in the present case, it is not open to the defendant newspaper to say: `We admit the imputations are not true, and admit they are defamatory, but we acted in perfect good faith and had a duty to all persons who might read our paper, to inform them of all these untrue and defamatory reflections upon the plaintiff.'

Mere curiosity in the subject matter of a defamation or a mere avidity for information about the subject is not, without more, sufficient to attract an occasion

of qualified privilege, however widespread the curiosity or avidity for information may be (*Truth (N.S.) Ltd. v. Holloway* [1960] NZLR 69 at 83; affd [1960] 1 WLR 997). In *Loveday v. Sun Newspapers Ltd.* [1938] 59 CLR 503 at 513; Latham C.J. said:

> There is ... no principle of law which entitles a newspaper to publish a defamatory statement of fact about an individual merely because the statement is made in the course of dealing with a matter of public interest.

And, in *Lang v. Willis* [1934] 52 CLR 637 at 667 Dixon J. regarded as untenable the proposition "that election speeches made to a large audience of unidentified persons are privileged". Evatt J. was of a similar opinion (*ibid.* at 672). The titillation of calumny is not to be mistaken for the public interest. In *Webb v. Times Publishing Co. Ltd.* [1960] 2 QB 535 at 569 Pearson J. said:

> One has to look for a legitimate and proper interest as contrasted with an interest which is due to idle curiosity or a desire for gossip. There is not necessarily anything wrong in newspapers publishing news items which appeal only to idle curiosity or the desire for gossip. But, if they do, there is not in the subject-matter any such legitimate and proper interest as is needed to confer privilege for an incidental defamation that may be involved.

Hitherto, the protection of personal reputation has weighed - as it should continue to weigh - heavily with the Courts in determining whether the public's interest in the subject matter of a defamatory publication overrides the law's concern to protect personal reputation.

The Courts have spelt out the reason why the organs of mass communication are not given a *carte blanche* to publish defamatory matter about any person which they believe to be true so long as it relates to a matter of public interest. In *Campbell v. Spottiswoode,* Cockburn C.J. said [1863] 3 B & S 769 at 777 [122 ER 288 at 291]:

> It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character, and made without any foundation.

Cartwright J., speaking for the Supreme Court of Canada in *Globe & Mail Ltd. v. Boland* and citing this dictum with approval, stated where the public interest lay in these terms [1960] 22 DLR (2d) 277 at 281:

> To hold that during a Federal election campaign in Canada any defamatory statement published in the press relating to a candidate's fitness for office is to be taken as published on an occasion of qualified privilege would be, in my opinion, not only be contrary to the great weight of authority in England and in this country but harmful to that 'common convenience and welfare of society' which Baron Parke described as the underlying principle on which the rules as to qualified privilege are founded. (See *Toogood v. Spyring* [1834] 1 C M & R at 193 [149 ER at 1049-1050]). It would mean that every man who offers himself as a candidate must be prepared to risk the loss of his reputation without redress unless he be able to prove affirmatively that those who defamed him were actuated by express malice. I would like to adopt the following sentence from the judgment of the Court in *Post Pub. Co. v. Hallam* [1893] 59 Fed 530 at 540:

> 'We think that not only is such sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good.'

If the law were different from that expressed in these passages, it would be a charter for scandal-mongering. Personal reputations could be destroyed by any person who honestly believed the scandal for, in that event, the possibility of vindication would be denied. The massive power of the modern media would be free both to define the subjects of public debate and to feed those debates with information having no more substantial provenance than the publisher's own belief in its truth. Politics would pass from politicians to publishers. That would be inimical to democratic government; it would not be for the good of society.

A newspaper publishes a report of a defamatory allegation

The second form in which a newspaper may publish matter defamatory of a plaintiff is in a report containing a statement by a third party. That is the present case. Of course, a newspaper that publishes a report of a statement defamatory of a plaintiff made by a third party is itself a publisher of defamatory matter. I respectfully agree with what the Court of Appeal of New South Wales said in *Wake v. John Fairfax & Sons Ltd.* [1973] 1 NSWLR 43 at 50:

> There can be no such general rule as was submitted to us that the repeater or reporter of the defamatory statement of another is not liable as for defamation unless he adopts it or re-affirms it. Principle and authority both lead in a different direction. Lord Devlin said in *Lewis v. Daily Telegraph Ltd.* [1964] AC 234 at 284:
>
> > For the purpose of the law of libel a hearsay statement is the same as a direct statement, and that is all there is to it.
>
> *Bell v. Byrne* [1811] 13 East 554 [104 ER 486] is authority for the proposition that if one asserts defamatory matter as from himself or says that it was asserted or written by another, it is equally the subject of an action.
>
> When a defamatory publication purports to repeat or report the defamatory statement of another it is an essentially different libel from one where the same imputation is conveyed directly. It may require to be charged or defended differently, but it is nonetheless libel.

However, where a defamatory fact is published in a report of a statement made by another source, it is a different sort of libel from a libel to which (to use the words of Bayley J. in *Bell v. Byrne* [1811] 13 East 554 at 563 [104 ER 486 at 489]) the newspaper "pledges [its] own knowledge of the fact". The newspaper may have no independent knowledge of the defamatory fact stated by a third party, much less an honest belief in the truth of that fact. If the publication of a report of a defamatory statement made by a third party be privileged, the privilege must arise from the public interest in knowing that the statement was made in the circumstances in which it was made and by the source to whom or to which it was attributed. As already noted, the report must be a fair and accurate account of those matters or no question of privilege can arise (*Morosi v. Mirror Newspapers Ltd.* [1977] 2 NSWLR at 780; *John Fairfax v. Punch* [1980] 31 ALR at 634).

At common law, fair and accurate reports of proceedings in Parliament (*R. v. Wright* [1799] 8 T R 293 [101 ER 1396]; *Wason v. Walter* [1868] LR 4 QB 73) and in the Courts (*Kimber v. The Press Association* [1893] 1 QB 65 at 68) are published on occasions

of qualified privilege. In these cases, it is the public interest in the proceedings themselves, not in the subject matter discussed in those proceedings, which creates the occasion of qualified privilege (*Allbutt v. General Council of Medical Education and Registration* [1889] 23 QBD at 410; *Wason v. Walter Davison v. Duncan* [1857] 7 E1 & B1 229 at 231 [119 ER 1233 at 1233]). Privilege may also attach to the publication of fair and accurate reports of defamatory statements made in the proceedings of public bodies other than Parliament and the Courts. Thus, the proceedings of bodies whose functions relate to the control of particular fields of public activity - sporting control bodies, for example - may be reported on occasions of qualified privilege if the subject matter relates to the performance of those functions and if it can be rightly said that the general public has a relevant interest (*Wake v. John Fairfax & Sons Ltd*. [1973] 1 NSWLR at 47). But it is not every public body whose proceedings can be reported on an occasion of qualified privilege without limit as to subject matter.

In *Perera (M.G.) v. Peiris* [1949] AC 1 at 21 Lord Uthwatt said:

> Reports of judicial and parliamentary proceedings and, it may be, of some bodies which are neither judicial nor parliamentary in character, stand in a class apart by reason that the nature of their activities is treated as conclusively establishing that the public interest is forwarded by publication of reports of their proceedings. As regards reports of proceedings of other bodies, the status of those bodies taken alone is not conclusive and it is necessary to consider the subject-matter dealt with in the particular report with which the Court is concerned. If it appears that it is to the public interest that the particular report should be published privilege will attach.

In that case, fair and accurate extracts of an official report issued by the Bribery Commission of Ceylon relating to payments to members of the State Council were published by a newspaper, the extracts containing facts defamatory of the plaintiff. The publication was privileged. Similarly, in *Allbutt v. General Council of Medical Education and Registration* [1889] 23 QBD 400 at 410, the Council published both its finding against a medical practitioner that he was guilty of infamous conduct in a professional respect and its resolution to remove his name from the medical register. The publication was held to be privileged. In both of these cases, the bodies whose proceedings were reported were charged with the performance of public functions that included inquiry into and ascertainment of misconduct on the part of individuals. Those were functions assigned to the respective bodies in order to safeguard the public and the public had an interest in knowing of the manner in which those functions were performed (see *Chapman v. Ellesmere (Lord)* [1932] 2 KB 431 at 466-467 and also *Cox v. Feeney* [1863] 4 F & F 13 [176 445]).

On the other hand, where a meeting of poor law guardians received an allegation against the medical officer of a workhouse for the poor to which no response from the medical officer had been sought, publication by a newspaper of a report of the guardians' meeting containing the defamatory allegation was not privileged: *Purcell v. Sowler* [1877] 2 CPD 215. The grounds assigned for denying protection to the publication of the report were various and they appear in other cases relating to reports of public bodies: the limited jurisdiction of the body whose proceedings are reported (*ibid*. at 219, 221; see also *Popham v. Pickburn* [1862] 7 H & N 891 [158 ER 730] (a vestry board), the proper privacy of the proceedings [1877] 2 CPD at 219-220, 221, 223; see also *Chapman v. Ellesmere (Lord)* [1932] 2 KB at 475, and the *exparte* making of the defamatory allegation ibid. at 221, 222-223; see also *Blackshaw*

v. Lord [1984] QB at 26) . In *Purcell v. Sowler,* the medical treatment of the poor was acknowledged to be a matter of considerable public interest, but public interest in that subject did not protect a publication of a newspaper report of the making of the allegation of the medical officer's misconduct. The meeting of the poor law guardians threw no cloak of privilege over the newspaper publication of the fact that the allegation had been made. And, in *Chapman v. Ellesmere (Lord)* where a defamatory finding by stewards of the Jockey Club was published in *The Times,* Romer L.J. said [1932] 2 KB at 474-475:

> So far as regards the Times Publishing Company, it may in one sense by true to say that they owe a duty to their readers to publish any and every item of news that may interest them. But this is not such a duty as makes every communication in their paper relating to a matter of public interest a privileged one. If it were, the power of the Press to libel public men with impunity would in the absence of malice be almost unlimited.

Where privilege is claimed on the footing of the public interest in the functioning of public bodies, it is necessary to evaluate a number of factors, for public interest as an entirety is a many-faceted concept and one of its facets is the public interest in allowing a person who has been falsely defamed to vindicate the damaged reputation. It follows that the privilege for the reporting of the functioning of public bodies does not extend to the protection of reports of every defamatory allegation that may be made at the meetings of public bodies. The availability of privilege depends upon the evaluation of factors that fall roughly, but not exclusively, into two groups: those affecting the public interest in the functioning of the body (its status, constitution and functions and the circumstances in which the defamatory statement was made) and those affecting the public interest in the subject matter of the report (the source of the defamatory statement, the opportunity for response and any making of a finding after inquiry).

The evaluation of public interest depends also on the extent of the publication for which protection is claimed. Sometimes it is necessary to confine the publication of a report containing defamatory matter, for there can be no duty to publish defamatory matter to those who have no interest (other than curiosity) in the subject matter (*Adam v. Ward* [1917] AC at 321). If a publication that would be privileged if restricted to those who have an interest in knowing the subject matter of a report is published more widely - to the general readership of a daily newspaper, for example - the publication may fail to attract the privilege: *Chapman v. Ellesmere (Lord)* [1932] 2 KB at 467, 474. See also *Telegraph Newspaper Co. Ltd. v. Bedford* [1934] 50 CLR at 648-649, 662-663; *Radio 2UE Sydney Pty. Ltd. v. Parker* [1992] 29 NSWLR 448 at 461. However, where the social or moral duty to publish is such as to warrant publication of the defamatory matter by a newspaper or by another medium of mass communication, the occasion of qualified privilege is not lost by dissemination of the matter to some recipients who have no interest or duty to receive it and to whom there is no reciprocal duty to communicate *(Adam v. Ward* [1917] AC at 324; *Guise v. Kouvelis* [1947] 74 CLR at 122-123, 125). Publication in a newspaper of a rebuttal of a public attack may be privileged when it is the only effective mode of response (*Chapman v. Ellesmere (Lord)* [1932] 2 KB at 456, 457; *Loveday v. Sun Newspapers Ltd.* [1938] 59 CLR at 521).

Apart from reports of the proceedings of public bodies, there are few instances where the publication of a report of a defamatory statement made on a subject of public

interest by an individual or concerned third party is privileged. There is no privilege for the publication of a report of an allegation of a defamatory fact merely because the report is of general interest to the readers of a newspaper (*Davis v. Shepstone* [1886] 11 App Cas at 191; *Nationwide News Pty. Ltd. v. Wiese* [1990] 4 WAR 263 at 267). Despite a sentence in the judgment of Pearson J. in *Webb v. Times Publishing Co. Ltd.* [1960] 2 QB 535 at 565 which encouraged for a time the view that "fair information on a matter of public interest" was a good defence at common law (see *Allen v. John Fairfax & Sons Ltd.* [1971] 1 NSWLR 773), that view has been rejected *(Wake v. John Fairfax & Sons Ltd.* [1973] 1 NSWLR at 48; *Morosi v. Mirror Newspapers Ltd.* [1977] 2 NSWLR at 782; *Blackshaw v. Lord* [1984] QB at 26). And rightly so, in my opinion. It omits the critical requirement that the publication be for the welfare of society. A newspaper has no duty to communicate defamatory matter to its readers merely because they will be interested to read it; there must be some legal, social or moral duty to publish it for the welfare of society.

The law draws a distinction between "the **right** which the publisher of a newspaper has, in common with all Her Majesty's subjects, to report truthfully and comment fairly upon matters of public interest [and] a **duty** of the sort which gives rise to an occasion of qualified privilege": *Globe & Mail Ltd. v. Boland* [1960] 22 DLR (2d) at 280-281. Nevertheless, the underlying principle of *Toogood v. Spyring* is applicable in every case and there are cases where a report of a defamatory communication made with the intent that it be published in the mass media to the public at large is protected. *Dunford Publicity v. News Media* [1971] NZLR 961; (see also *Cox v. Feeney* [1863] 4 F & F 13 [176 ER 445]) was such a case. In that case a newspaper was held to be under a duty to publish a Minister's statement and the surrounding facts needed to correct misleading representations by the promoter of a road safety competition that the Minister had endorsed the commercial operation of the competition. The public had a real interest in knowing of the Minister's attitude to the competition and the newspaper had a duty to publish the Minister's correction. The privilege rested, I should think, on the need to protect the public from being deceived.

In principle, an occasion of qualified privilege may arise where there is a need to inform the public in order to allow the public to perform its own proper functions, as perceived in "the varying conditions of society". These functions are now recognized to include the discussion and formulation of judgments relating to government, government institutions and political matters (*Nationwide News Pty. Ltd. v. Wills* [1992] 177 CLR 1 at 48, 72; *Australian Capital Television v. The Commonwealth* [1992] 177 CLR 106 at 139, 159, 212, 231). It is the public interest in the functioning of public institutions which founds the privilege for publication of reports of their proceedings. In like manner, the public interest in the conduct of government and governmental institutions and in matters of political importance can found a privilege for the publication of statements which, though defamatory, relate to those matters as Smithers J. held in *Australian Broadcasting Corporation v. Comalco Ltd.* [1985] 68 ALR 259 esp at 289, 290. The value of informed public discussion of those matters is not open to doubt: *Australian Consolidated Press Ltd. v. Uren* [1966] 177 CLR 185 at 210; *Calwell v. Ipec Australia Ltd.* [1975] 135 CLR 321 at 331, 335-336. But, just as there are factors which bear upon the existence of an occasion of qualified privilege for the publication of a report of the proceedings of a public body, so there are factors which bear upon the existence of an occasion

of qualified privilege for the publication of a report of a statement of a fact defamatory of a plaintiff made by a third party who is an individual or who does not have the status of a public body.

First, of course, the subject matter of the defamatory statement must be a matter of relevant public interest. That is to say, the public must have an interest in knowing the truth about the defamatory matter and in knowing that the statement has been made by the third party to whom it is attributed. Such an interest can arise because knowledge of the truth about the defamatory matter may either safeguard the public against some risk or damage (as in *Dunford Publicity v. News Media*) or inform the public of matters relevant to the performance by the public of its legal or customary functions (see *Cox v. Feeney* [1863] 4 F & F 13 at 23 [176 ER at 449-450]) where Cockburn C.J. directed the jury on loss of privilege by publication for an improper purpose. Some matters clearly fall within this category, the chief being matters relating to government, governmental institutions and politics. Other matters clearly fall outside the category, such as matters of merely personal scandal. And there are many matters on which publishers and, if litigation ensues, Judges must decide whether publication is for the welfare of society. Where only a section of the public has a relevant function to perform - for example, the members of an association, whether corporate or non-corporate - the privilege may attach only to publications to that section of the public. In addition to cases where the privilege is founded on public interest in the subject matter of the communication, the privilege can attach to publications made for the purpose of defending an interest of the person making the statement or of the publisher.

Secondly, the report of a third party's defamatory statement must be fair and accurate. If publication of a report of the making of a defamatory statement by a third party would serve the welfare of society, inaccuracy in reporting or biased editing of the statement would destroy the capacity of the report to serve that purpose.

There are further requirements relating to the maker of the defamatory statement and the opportunity of a defamed party to reply. The public interest in the publication of a report of a third party's defamatory statement requires some assurance of the truth of the defamatory matter. No such assurance can be given when the statement is made *ex parte* by a third party who has no particular knowledge of the defamatory matter. The only report that might claim the protection of qualified privilege is a report made by a third party who has, or is reasonably believed by the publisher to have, particular knowledge of the defamatory matter contained in the statement. Such a belief on the part of the publisher is essential to repel the inference of malice that would otherwise be drawn from the publication of defamatory matter that is not shown to be true.

Even so, mere belief as to the knowledge of the maker of the statement gives an insufficient assurance to the public of the truth of the defamatory matter. Just as publication of a report of an *ex parte* assertion of a defamatory fact made in the course of the proceedings of a public body does not attract the protection of qualified privilege (*Purcell v. Sowler* [1877] 2 Cpd 215), neither does a bare report of an *ex parte* allegation made by a third party. The party defamed must have an opportunity to make a reasonable response to the defamatory matter. The opportunity must be fairly given. It must be given promptly and with the capacity to reach the same

audience with the same ease as the report containing the defamatory matter. If a response can be obtained immediately, it must be; if it can be obtained only after some delay, it must be published promptly when it is available. If the response is not immediately available for contemporaneous publication with the report containing the defamatory matter, a statement that it is not available but will be published if and when available must be published contemporaneously with the report. Of course, delay in the publication of a response rarely expunges the damage done by the defamation. Nevertheless, in modern conditions, the choice is between, on the one hand, proscribing the publication of reports of defamatory statement in which the public has an interest in knowing the truth when those statements are made by third parties who are reasonably believed to have particular knowledge of the defamatory matter and, on the other, allowing publication of those reports when the party defamed has an opportunity to respond. When the report is published in a medium which is issued with regular frequency, the welfare of society is better served by the latter course. That course requires that the occasion of publication of the defamatory report be taken to extend to issues of the medium subsequent to the issue in which the report is published when those issues are published during the period reasonably necessary to seek and obtain a reasonable response from the party defamed.

If, viewing those issues together, the publication of a fair and accurate report of a defamatory statement made on a matter of public interest by a third party who is reasonably believed to have particular knowledge of the defamatory matter is accompanied by publication of any reasonable response which the party defamed wishes to make, the report is published on an occasion of qualified privilege. In that event, no inference of malice can be drawn against the publisher from the fact of publication, though the defamatory statement turns out to be false and the publisher had no personal knowledge of (and hence no belief in) its truth.

A newspaper publishes a defamatory letter to the editor

A letter to the editor and similar statements made by contributors who are not employed by the newspaper and do not contribute under contract stands in the same position as any other statement which a newspaper chooses to publish. The same principles govern the privilege of the occasion of publication.

Malice

If the occasion of publication of a report of a third party's defamatory statement be privileged, the publisher's privilege can be defeated by malice. But can it be destroyed by malice on the part of the third party unknown to the publisher? In *Smith v. Streatfeild* [1913] 3 KB 764 at 769 Bankes J. gave an affirmative answer to this question. In *Webb v. Bloch* [1928] 41 CLR 331 at 365-366 Isaacs J. treated *Smith v. Streatfeild* as an example of the principle that a "principal and agent *inter* se are principals in relation to the person defamed". This led his Honour to regard malice on the part of one of them as defeating the privilege of the publication for which both were liable. Again, in *McKernan v. Fraser* [1931] 46 CLR 343 at 406 Evatt J. explained *Smith v. Streatfeild* as a case where the privilege of the publisher was the privilege "vested" in the author and, as they were joint publishers, the single privilege was defeated by the author's malice. Then, in *Bedford's Case* [1934] 50 CLR at 661 Evatt J. referred to these three cases to support the proposition that, if the newspaper which had published an edited version of a contributor's defamatory

letter, had sought to rely on the contributor's privilege, proof of the contributor's malice would have defeated the newspaper's claim to privilege.

However, *Smith v. Streatfeild* has not survived a closer analysis of the law of qualified privilege. Jordan C.J. in *Dougherty v. Chandler* [1946] 46 SR(NSW) 370 at 375-376 and Slade J. in *Longdon-Griffiths v. Smith* [1951] 1 KB 295 at 302 noted its dubious authority. In the latter case, Slade J. restricted the application of *Smith v. Streatfeild* to a case where the innocent publisher could raise the defence of qualified privilege "merely because his publication is ancillary to and reasonably necessary for the discharge of the duty which creates the privilege" (*ibid*. at 304). But his Lordship held that the defendants could not be joint tortfeasors unless they were first tortfeasors and that none who was innocent of malice when the defamatory matter was published on an occasion of qualified privilege could be a tortfeasor (*ibid*. at 302). In *Egger v. Viscount Chelmsford* [1965] 1 QB 248, *Smith v. Streatfeild* was overruled by the Court of Appeal. Their Lordships accepted that a principal might be held liable for a malicious publication by his agent (a proposition that was thought to explain *Webb v. Bloch*) but rejected the notion that an agent might be held liable merely on account of his principal's malice. They treated the liability of each defendant as depending on that defendant's own state of mind, unaffected by the malice of any other defendant (*ibid*. at 264, 266, 272; and see *Loveday v. Sun Newspapers Ltd*. [1938] 59 CLR at 516, 523). I respectfully agree with the decision in that case.

If, as between a plaintiff and a defendant, a publication is made in circumstances which imposed on that defendant a legal, social or moral duty to publish it, that defendant is not liable to the plaintiff unless malice be proved against him and it is immaterial that another defendant who was party to the publication and who was under a similar duty is found to have acted out of malice. In other words, each defendant is entitled to his own defence and the malice of one does not defeat the defence of another. We need not trouble in the present case to consider the position of the innocent principal who engages a malicious agent to publish or the position of the innocent agent who has no privilege save that which might be derived from a malicious principal. We are here concerned with a newspaper's privilege to publish a report of a third party's defamatory statement: a case where, whatever be the relationship between the third party and the plaintiff and whether the third party be malicious or not, there is found to be a duty on the newspaper to publish. In such a case the privilege is lost only if malice be proved against the newspaper.

The common law and the plea in par. 20B

This review of the common law, as I would hold it to be, reveals the common law's characteristic ability to balance competing aspects of the public interest in the contemporary conditions of society. It would be incongruous in today's conditions to deny the freedom of the media to report an apparently responsible statement defamatory of a plaintiff in relation to the conduct of government, governmental institutions and political matters when the statement is made by a person who is reasonably believed to have particular knowledge of the defamatory fact, the report is fair and accurate and a reasonable response by the plaintiff, if available, is contemporaneously or promptly published. The common law is not only consistent with the system of representative government prescribed by the Constitutions of the Commonwealth and of the States; it also provides the flexibility of application which

is essential to balance the important interests of personal reputation and free speech and which the necessary rigidity of constitutional formulae cannot provide. A constitutional formula based on the text of a constitution - whether of the Commonwealth or of the State of Western Australia - could release the media from restraint but, in my respectful opinion, it could not preserve free speech in a society which values also the right to personal reputation.

In the present case the statement attributed to Mr Lockyer relates to the performance by members of the legislative Council of their official functions and the commitment of public moneys to the expenses of the Committee's overseas trip. These are plainly matters of public interest. If the allegations made by Mr Lockyer were true it is a matter on which the public was entitled to be informed in order that it could form and act upon its views about the conduct of public officers and the operations of a central institution of government. The members of the Legislative Council are elected on a universal adult suffrage (Electoral Act 1907 (W.A.), s. 17). The particulars of par.20B do not plead that the report fairly and accurately stated what Mr Lockyer said or that Mr Lockyer was, at the material times, a member of the Legislative Council. Making those assumptions, there is material on which a trial Judge might be satisfied that Mr Lockyer had or appeared to have particular knowledge about the absence of parliamentary approval for the expenditure of public moneys on the Committee's overseas trip. And it may not have been practical to obtain a response from the members of the Committee at the time however, some response from the President of the Legislative Council was included in the second article. It does not appear whether the plaintiffs were given or took an opportunity subsequently to have a response published. The particulars plead that the articles complained of "were published predominantly to persons who were enrolled as electors of the Legislative Council of Western Australia". In my view, if one makes the assumptions stated, the particulars pleaded in par.20B might be sufficient if established to satisfy the trial Judge that, in the circumstances of the case, the defendant published the articles complained of on occasions of qualified privilege.

I would answer the first question: Paragraph 20A is bad in law. I would answer the second question: Paragraph 20B is bad in law unless it can properly be, and is, amended to plead (i) that the articles fairly and accurately report statements made by Mr Lockyer; (ii) that Mr Lockyer was reasonably believed by the defendant to have particular knowledge of the defamatory facts reported; and (iii) the defendant, having sought responses of the respective plaintiffs, either received no reasonable response or published those responses as they became available.

Deane J:

In *Theophanous v. The Herald & Weekly Times Limited*, I explained the reasons which caused me to conclude that the Constitution's implication of freedom of political communication and discussion precluded the application of State defamation laws to impose liability in damages for statements or comments made about the suitability for office or official conduct of a member of the Commonwealth Parliament or other holder of high Commonwealth office. Those reasons would also lead me to conclude that the constitutional implication, which extends to political communication and discussion in relation to all levels of government including State government see (*Australian Capital Television v. The Commonwealth* [1992] 177 CLR 106 at 142, 168-169, 215-217; *Theophanous v. The Herald & Weekly Times Limited & Anor.*, Unreported, 12 October 1994, at 6 per Mason C.J., Toohey and

Gaudron JJ., at 49-50 per Deane J.) and which applies to confine the laws and legislative powers of the States as well as the Commonwealth see (*Theophanous* at 6 per Mason C.J., Toohey and Gaudron JJ., at 49-50 per Deane), precludes the application of State defamation laws to impose liability in damages for statements or comments about the suitability for office or official conduct of a member of a State Parliament or other holder of high State public office. My views did not, however, prevail in *Theophanous* to the extent that they would attribute a less qualified operation to the constitutional implication in such cases than that accorded it by Mason C.J., Toohey and Gaudron JJ. In view of the division between the other members of the Court, it would, to that extent, be inappropriate for me to adhere to them for the purposes of this case.

Accordingly, I express my concurrence in the answers which Mason C.J., Toohey and Gaudron JJ. propose to the questions stated for the consideration of the Full Court.

Dawson J:

This matter arises by way of case stated pursuant to s. 18 of the Judiciary Act 1903 (Cth). The circumstances appear sufficiently from other judgments and I shall not repeat them. The questions asked are whether par.20A and par.20B of the further amended defence are bad in law.

The defence pleaded in par.20A is that "the newspaper articles complained of were published pursuant to a freedom guaranteed by the Commonwealth Constitution and the Constitution Act, 1889 (WA)". The defence relies on a freedom of speech said to be guaranteed by those sections of the Commonwealth Constitution and the Constitution Act 1889 (W.A.) which provide for representative government. For the reasons which I gave in *Theophanous v. The Herald & Weekly Times Limited* unreported, 12 October 1994, I am of the view that no such freedom as that upon which the defence relies can be implied from those provisions. Accordingly, I do not think that the defence can be made out. I would answer the first question, yes.

Paragraph 20B attempts to raise the common law defence of qualified privilege but does so upon the basis of matter consisting of comment rather than fact. Nothing appears from the pleadings which could be said to constitute information which the defendant had a duty or interest to impart and the recipients had a corresponding duty or interest to receive. I agree with McHugh J., for the reasons which he gives, that the available plea is fair comment rather than qualified privilege. It is not apparent whether the defendant could recast its pleading so as to raise the defence of qualified privilege, even though the publication was to the world at large rather than to a restricted class of interested persons. It is, therefore, unnecessary to consider further the scope of that defence in the present proceedings. I would answer the second question, yes.

McHugh J:

This case stated arises out of a defamation action pending in the Supreme Court of Western Australia which has been removed into this Court pursuant to the provisions of the Judiciary Act 1903 (Cth).

At all relevant times, the plaintiffs were members of the Legislative Council of Western Australia. The defendant publishes the newspaper, the *West Australian*. In 1992, the plaintiffs commenced the present action against the defendant after the

publication of three articles in the *West Australian*. The first two articles were published in June 1992; the third article was published in September 1992. The first article reported statements allegedly made by Mr Lockyer, another member of Parliament, to the effect that an overseas trip taken by the plaintiffs as the members of a parliamentary committee "is a junket of mammoth proportions". Mr Lockyer was reported as saying: "They've gone in secret hoping no one would find out about it and this is nothing but a rort which is costing taxpayers thousand of dollars." The second article reported that the Premier had "rejected a plea" to recall the committee. It repeated Mr Lockyer's claim that "six members of the government agencies committee had gone on a junket at taxpayers' expense without Parliament's knowledge." The third article, after referring to trips taken by two other members of Parliament, reported that Mr Lockyer had said that these two trips and the trip taken by the plaintiffs were "junkets". Mr Lockyer was also reported as having "accused all involved of sneaking off in secret".

The case stated asks whether two defences pleaded by the defendant in paragraphs 20A and 20B of its further amended defence are bad in law. Paragraph 20A asserts that "the newspaper articles complained of were published pursuant to a freedom guaranteed by the Commonwealth Constitution and the Constitution Act 1989 (WA) and are therefore not actionable". Paragraph 20B asserts that "the newspaper articles complained of were published on occasions of qualified privilege".

In *Theophanous v. The Herald & Weekly Times Limited* unreported, 12 October 1994, I have set out my reasons for concluding that the Commonwealth Constitution contains no guarantee of freedom of expression that would render the defendant immune from an action for defamation arising out of the publication of these three articles. The substance of those reasons also applies to the claim of the defendant that the Constitution of Western Australia contains an implied guarantee of freedom of expression that would render the publication of the articles immune from an action for defamation. It follows, in my opinion, that the defence pleaded in paragraph 20A is bad in law.

The defence of qualified privilege set out in paragraph 20B contains sixteen lettered paragraphs of particulars. The essential points raised in these particulars are:

(1) The articles related to the performance by the plaintiffs of their functions and duties as members of parliament and their suitability and qualification to continue to hold office.

(2) The articles related to possible misconduct in public office and to the spending of public money.

(3) The articles related to matters that were relevant to electors in determining whether they should cast a vote for the plaintiffs in elections to the Western Australian Parliament.

(4) The matters referred to in (1) were matters of public interest.

(5) The articles were written and edited by persons enrolled as electors in Western Australia.

(6) The articles were published predominantly to persons enrolled as electors. Publication in a newspaper is one of the most reasonably practicable modes of communication with the electors of Western Australia, and the mode, manner and extent of the publications were reasonable in the circumstances.

The defendant alleges that, by reason of these matters, it had an interest in publishing the matter complained of and that the readers of the *West Australian* had a reciprocal interest in receiving information about those matters.

In my opinion, the defence set out in paragraph 20B is not good in law because the defamatory matter consists of comment and not fact and the comment was not published in the course of publishing facts that would attract the defence of qualified privilege. If the defamatory matter is protected material, it is protected by the defence of fair comment or justification, not qualified privilege. In any event, the particulars of the defence are not sufficient in point of law to raise a defence of qualified privilege even if, contrary to my view, the defamatory imputations arise out of statements of fact in the articles. Even if the articles consisted mainly of fact, the particulars would need to allege two further facts to be good in law:

(1) The statements attributed to Mr Lockyer were in fact made by him with the intention that they be published to the general public.

(2) Mr Lockyer is a member of the Parliament of Western Australia.

The common law of qualified privilege

At common law, it is a defence to the publication of defamatory matter that the matter was published in good faith on an occasion of qualified privilege. Statements "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned" are privileged even though they contain untrue defamatory statements *(Toogood v. Spyring* [1834] 1 C M & R 181 at 193 [149 ER 1044 at 1049-1050]). However, the defence of qualified privilege is generally not available where defamatory matter is published in a newspaper. At common law, the defence is not open unless the recipient of the publication possessed an interest in receiving or was under a duty to receive the communication that corresponded with the interest or duty of the person making the publication (*Harrison v. Bush* [1855] 5 E1 & B1 344 at 348-349 [119 ER 509 at 512]; *Pullman v. Hill & Co.* [1891] 1 QB 524 at 528; *Adam v. Ward* [1917] AC 309 at 334; *Watt v. Longadon* [1930] 1 KB 130 at 147-148; *Mowlds v. Fergusson* [1940] 64 CLR 206 at 214-215; *Guise* [1947] 47 SR(NSW) 357 at 362; *Morosi v. Mirror Newspaper Ltd.* [1977] 2 NSWLR 749 at 775; *Duane v. Granrott* [1982] VR 767 at 781-782; *Nationwide News Pty. Ltd. v. Wiese* [1990] 4 WAR 263 at 267; *Pearce v. Hailstone* [1992] 58 SASR 240 at 264; *Radio 2EU Sydney Pty. Ltd. v. Parker* [1992] 29 NSWLR 448 at 459). In *Mowlds v. Fergusson* [1939] 40 SR(NSW) 311 at 318, Jordon C.J. explained the nature of the defence of qualified privilege as follows:

> A privileged occasion comes into existence whenever something occurs which creates in one person an interest or duty, legal, social, or moral, to communicate information to another to serve some particular purpose, and creates also in the other a corresponding interest or duty to receive the communication for that purpose. When such an occasion arises, any person having an interest or duty to make a communication to serve its purpose may make it to any person entitled to receive it; and if he restricts himself to a communication which is capable of serving the purpose of the occasion and is made with no other object than that of serving that purpose, he incurs no liability for libel or slander to any person of whom his communication may be in fact defamatory.

Reciprocity of interest or duty is essential to a claim of qualified privilege at common law (*Adam v. Ward* [1917] AC at 334). The need for reciprocity usually defeats a claim of qualified privilege where the publication has been made to the general public. Only in exceptional cases does a person have an interest or duty to publish defamatory matter to the world at large (*Duncombe v. Daniell* [1838] 2 Jur 32; [1837] Car & P 222 [173 ER 470]; *Chapman v. Ellesmere (Lord)* [1932] 2 KB 431; *Telegraph Newspaper Co. Ltd. v. Bedford* [1934] 50 CLR 632; *Lang v. Willis* [1934] 52 CLR 637; *Radio 2UE Pty. Ltd. v. Parker* [1992] 29 NSWLR 448). Both in Australia and elsewhere, common law Courts have repeatedly held that a person has no legitimate interest or duty to publish defamatory matter to the general public if no more is established than that the subject matter of the publication is one in which the public is interested (*Loveday v. Sun Newspapers Ltd.* [1938] 59 CLR 503 at 513; *Banks v. Globe & Mail Ltd.* [1961] 28 DLR (2d) 343 at 351; *Morosi* [1977] 2 NSWLR at 778; *Nationwide News Pty. Ltd. v. Wiese* [1990] 4 WAR at 267). In *Howe & McColough v. Lees* [1910] 11 CLR 361 at 398, Higgins J. said that the word "interest" was not used in any technical sense. However, his Honour said that the person must not be "interested in it as a matter of gossip or curiosity, but as a matter of substance apart from its mere quality as news" (*ibid*). In the same case, O'Connor J. said (*ibid.* at 377) that the interest must be "of so tangible a nature that for the common convenience and welfare of society it is expedient to protect it".

As the decided cases show, however, circumstances may exist where the interest of the general public in a particular subject is such that a defence of qualified privilege is available even though the communication is made to the general public by means of a newspaper or other medium of general circulation. If a subject is one of public interest, members of the public have the requisite interest in receiving information on that subject from persons who have a corresponding interest or duty to communicate that information to the general public. If such information is published in good faith, both the author and the publisher of the article are protected "for the common convenience and welfare of society" (*ibid*). The privilege of the publisher is "not an **original privilege** but one **ancillary** to, and dependent on, the existence of a privilege for the publication of the defamatory contents" (*Bryanston Finance Ltd. v. de Vries* [1975] QB 703 at 727) to the general public. In *Adam v. Ward* [1917] AC 309, a claim of qualified privilege was upheld in respect of a letter, published at the direction of the Army Council, that was intended to be and was published widely "in the British and Colonial Press". The House of Lords held that the general public had a sufficient interest in the contents of the letter to make the occasion one of qualified privilege because the letter recorded that the Council had acquitted a British Army General of charges of misconduct made against him by the plaintiff in the House of Commons. Lord Atkinson said (*ibid.* at 343) "[e] very subject ... who had an interest in the Army had an interest in being by a public communication informed of General Scobell's acquittal." Similarly, in *Loveday v. Sun Newspapers Ltd.* [1938] 59 CLR 503 this Court upheld a claim of qualified privilege where a newspaper article contained a reply to an attack on a municipal council made in the same article.

Both *Adam* and *Loveday* were concerned with publications in reply to attacks on the plaintiff or some other person which had been published to the world at large. But at least two cases show that the defence of qualified privilege may succeed even though the defamatory publication is not in reply to any attack. In *Allbutt v. General*

Council of Medical Education and Registration [1889] 23 QBD 400, the English Court of Appeal held that the Medical Council was entitled to a defence of qualified privilege in respect of a fair and accurate report to the public of the grounds for removing the name of a medical practitioner from the register of practitioners. In *Dunford Publicity v. New Media* [1971] NZLR 961. Macarthur J. upheld a defence of qualified privilege in respect of a Minister's criticism of the plaintiff, which had been published in a newspaper with a wide circulation. The criticism was the result of the Minister's belief that he had been misled into giving a letter of commendation in support of a road safety competition associated with the sale of Christmas cards by the plaintiff. Macarthur J. said *ibid*. at 968:

> Here, the Minister was misled by the organisers of the road safety contest. It was the duty of the Minister to ensure, and it was in the interests of the public, that his statement on the matter be given wide circulation. The wide circulation afforded by publication in a newspaper was proper. The matter was undoubtedly a matter of public interest. The Minister requested *Truth* to publish his statement.

These two cases show that the proprietor of a newspaper or a radio or television station is entitled to a defence of qualified privilege when it publishes statements made by a third person pursuant to or in discharge of that person's interest or duty to inform the general public about a matter.

In determining whether a person has a legal, social or moral interest or duty to publish to the world at large, the extent of the publication and the proportion of readers who have a legitimate interest in receiving the communication are relevant factors to be weighed (see e.g. *Duncombe v. Daniell* [1837] Car & P 222 [173 ER 470]; *Chapman v. Ellesmere (Lord)* [1932] 2 KB 431; *Telegraph Newspapers Co. Ltd. v. Bedford* [1934] 50 CLR 632; *Lang v. Willis* (1934) 52 CLR 637; *Radio 2UE Pty. Ltd. v. Parker* [1992] 29 NSWLR 448). It has long been established, however, that qualified privilege is not lost simply because the communication is read, seen or heard by persons having no legitimate interest in receiving the communication (*Toogood v. Spyring* [1834] 1 C M & R at 193-194 [149 ER at 1050]; *Padmore v. Lawrence* [1840] 11 Ad & E 380 at 383 [113 ER 460 at 461]; *Kershaw v. Bailey* [1848] 1 Ex 734 at 748 [154 ER 316 at 318-319]; *Pittard v. Oliver* [1891] 1 QB 474 at 478 and see *Adam v. Ward* [1918] AC at 324). If publication in a newspaper or by radio or television is the only reasonable mode of communicating with the public, qualified privilege will not be lost because it is read, seen or heard by persons who have no legitimate interest in receiving the communication.

Although, as the foregoing account of the case law demonstrates, the common law has upheld defences of qualified privilege for publications to the world at large, common law Courts have taken a restricted view of the occasions when a person has an interest or duty to publish material to the general public. Protection of reputation has generally been preferred to the right of the public to know. It is not surprising that successive generations of common law Judges have been loath to extend the categories of qualified privilege to protect publications in the general media. Although the tort of defamation became established at an early stage in the history of common law, the defence of qualified privilege, as we know it, was not recognised until the first part of the last century (see the argument of Sir Valentine Holmes K.C. in *Perera (M.G.) v. Peiris* [1949] AC 1 at 9-10). New legal doctrines take time to win general acceptance in the legal profession, and the low quality and sensational nature of significant parts of the late 19th century and 20th century media have not

a been conducive to the extension of a defence that protects the publication of untrue defamatory material. However, as Cockburn C.J. is reported to have said (Spencer Bower, **A Code of the Law of Actionable Defamation**, 2nd ed. [1923] at ix) "those who administer [the law of qualified privilege] must adapt it to the varying conditions of society".

b In the last decade of the 20th century, the quality of life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys. How, when, why and where those functions and powers are or are not exercised are matters that are of real and legitimate interest to every member of the community. Information concerning the exercise of those functions and powers is of vital concern to the community. So is the
c performance of the public representatives and officials who are invested with them. It follows in my opinion that the general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials. Moreover, a narrow view should not be taken of the matters about which the general public has an interest in receiving information. With the increasing integration of the social, economic and
d political life of Australia, it is difficult to contend that the exercise or failure to exercise public functions or powers at any particular level of government or administration, or in any part of the country, is not of relevant interest to the public of Australia generally. If this legitimate interest of the public is to be properly served, it must also follow that on occasions persons with special knowledge concerning the exercise of public functions or powers or the performance by public
e representatives or officials of their duties will have a corresponding duty or interest to communicate information concerning such functions, powers and performances to members of the general public. In *Jenoure v. Delmege* [1891] AC 73 at 77, Lord Macnaghten said that "[t]o protect those who are not able to protect themselves is a duty which every one owes to society."

f Accordingly, it is now appropriate for the common law to declare that it is for "the common convenience and welfare" of Australian society that the existing categories of qualified privilege be extended to protect communications made to the general public by persons with special knowledge concerning the exercise of public functions or powers or the performance of their duties by public representatives or officials invested with those functions and powers. The scientist who discovers that lack of
g governmental action is threatening the environment, the "whistleblower" who observes the bureaucratic or ministerial "cover up", and the investigative journalist who finds that grants of public money have been distributed contrary to the public interest are examples of persons who have special knowledge of matters affecting the exercise of public functions or powers or the performance of duties by public representatives or officials. If such persons, acting honestly, inform the general
h public of what they know about such matters, their publications will be made on an occasion of qualified privilege. The defence of qualified privilege will be available even if the information is subsequently proved to be incorrect. Thus, the occasion will still be privileged even if the "whistleblower" mistakenly but honestly publishes information which defames another person or the scientist or journalist honestly overlooks some fact which undermines the thesis of his or her claim. The publication
i of erroneous information may be evidence of malice in some cases. But by itself an error in the published information will not destroy the occasion of privilege.

No doubt in some exceptional cases the information published may be so unrelated to the kind of powers or functions invested in the person defamed that a defence of qualified privilege could not be upheld. But, speaking generally, the occasion will be privileged whenever a person with the requisite special knowledge honestly publishes information about the functions or powers or the performance of duties by public representatives or officials for the purpose of informing the public about such matters. The officiousness of the person publishing the information can never be decisive against the existence of an occasion of qualified privilege, although it may be relevant in determining whether there was a duty to publish to the world at large (cf. *Greenlands Limited v. Wilmshurst and the London Association for Protection of Trade* [1913] 3 KB 507 at 535).

Moreover, if the information is to reach the general public, it will often be necessary for the person wishing to convey that information to use a media outlet of wide circulation. In *Attorney-General v. Times Newspapers* [1974] AC 273 at 315, Lord Simon of Glaisdale pointed out that:

> People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument.

I see no difficulty, having regard to the case law, in holding that the media has an ancillary privilege to publish in good faith apparently reliable information obtained from a person who has an apparent duty or interest in making the information available to the public. However, where the media outlet relies on an ancillary privilege derived from the privilege of the person making the statement, the outlet's claim for qualified privilege will be lost if the privilege of the original holder is lost.

In my opinion, however, the common convenience and welfare of Australian society does not require that every defamatory comment made by a person with special knowledge of the functions, powers or performance of duty by public representatives or officials should be protected by qualified privilege. If the comment is based on, and published with, facts about which that person has special knowledge, it would be in accordance with authority to hold that any defamatory comment on those facts was privileged if the facts themselves are privileged (*Pervan v. North Queensland Newspaper Co. Ltd.* [1993] 178 CLR 309). But it does not follow that the existing categories of qualified privilege should be extended to cover bare defamatory comment.

It is true that, if a comment is published in respect of a subject of public interest, a defence of fair comment is open even though the publication does not set out the facts upon which the comment is based (*Kemsley v. Foot* [1952] AC 345 at 357-358, 361; *Pervan* [1993] 178 CLR at 340-347). As long as the subject matter of the comment is indicated with sufficient clarity, the defendant may establish the fairness of the comment by proving any fact which would justify its fairness (*Kemsley* [1952] AC at 358, 361; *Pervan* [1993] 178 CLR at 340). Furthermore, in many situations, the existing categories of qualified privilege protect bare defamatory comment. But if the doctrine of qualified privilege at common law was extended beyond the existing categories to cover the publication to the general public of bare defamatory comment made by a person with a special knowledge of a subject of public interest, it would render the defence of fair comment in such a situation largely, if not entirely,

superfluous. If the defence of fair comment or the existing categories of qualified privilege do not protect the publication of a bare defamatory comment, it is difficult to see how the public interest is served by extending the defence of qualified privilege to protect that comment. In such a case, the public is not given the facts that are the basis of the comment and the public is not in a position to make any judgment about the fairness of a comment which, by hypothesis, is unfair and defamatory.

It is one thing to extend the doctrine of qualified privilege to protect the publication of defamatory facts that turn out to be untrue and to protect any comments that are based upon them. If the facts are published to those who have an interest or duty to receive them by a person with a corresponding duty or interest to publish them, society benefits because experience has shown that, in the absence of malice, the factual content of such publications is generally true. Society benefits even though some statements made on those occasions are in fact untrue. But, although some champions of freedom of expression might argue otherwise, I am not convinced that society benefits by allowing persons to make defamatory comments that injure the reputations of others unless that comment is fair and based on facts that are true or on facts that attract the defence of qualified privilege. The defence of fair comment on subjects of public interest already gives wide protection to the publication of defamatory comments made to the general public. I do not think that this Court would be justified, either as a matter of legal principle or by contemporary need, in extending the defence of qualified privilege to bare defamatory comments in cases where it is not protected by the existing categories of that defence.

Qualified privilege in this case

The performance by members of Parliament of their duties and the use of public moneys by parliamentarians are subjects concerned with the exercise of public functions and powers and the performance of the duties of persons invested with those functions and powers. Members of the public have a legitimate interest in receiving information on those subjects from any person having a duty or interest to communicate that information to the general public. Mr Lockyer is, according to the articles sued upon, a member of the same Parliament as the plaintiffs. He is in a position where it is likely that he has special knowledge of the matters that are the subjects of the article. Every resident of Western Australia has an interest in receiving information about the subjects of public interest referred to in the article whether that resident is enrolled as an elector or not. In the words of Williams J. in this Court in *Mowlds v. Fergusson* [1940] 64 CLR at 220 "the great mass of Australians of ordinary intelligence and moral principle would have recognised the right" of a person, with special knowledge, to publish information on the subjects of public interest dealt with in the articles, if that person honestly believed the information to be true.

In addition to the duty or interest arising from special knowledge, the position of Mr Lockyer, as a member of the Parliament of Western Australia is sufficient, by itself, to generate a duty to make public statements concerning matters relevant to his parliamentary duties. The common law has long recognised that those elected to public bodies have a duty to speak freely at meetings of those bodies and that any defamatory statement made at a meeting of such a body is privileged unless lack of good faith is proved (*George v. Goddard* [1861] 2 F & F 689 [175 ER 1242]; *Pittard v. Oliver* [1891] 1 QB 474; *Gray v. Chilman* [1935] SASR 260; *Horrocks v. Lowe* [1975]

AC 135). Indeed, parliamentarians have an absolute privilege to publish statements in the course of parliamentary proceedings. Any fair report of defamatory statements made at a meeting of Parliament or an elected body is also published on an occasion of qualified privilege (*Wason v. Walter* [1868] LR 4 QB 73). To hold that statements made by elected representatives are protected by privilege if they are made during a meeting of the body to which they are elected but not if made before or after a meeting of that body would be to allow form to triumph over substance. Moreover, it would mean that the common law was out of touch with contemporary notions of informing the public about matters of public interest. Publicly elected representatives no longer wait until meetings of the bodies, to which they are elected, before they make public statements concerning matters of public interest. Indeed, the "common convenience and welfare of society" often requires that they should make such statements without waiting for a sitting of the body to which they are elected. If the common law of qualified privilege would protect a factual statement made by a public representative at a meeting of a public body, it is simply to adapt established principle to contemporary needs to hold that it also protects the same statement if it is made in good faith outside the course of that meeting. However, for the reasons I have already given, I do not think that it is for the common convenience and welfare of society to extend the doctrine of qualified privilege to defamatory comments made by elected representatives when those comments are not published in the course of providing factual information to the general public.

In the present case, the material which is capable of being regarded as defamatory of the plaintiffs is essentially comment. To attract the protection of the doctrine of qualified privilege for defamatory comments published to the world at large, more is required than the publication of comments and opinions concerning a subject of public interest. In a case such as the present, the comment must be on facts which provide information to the public about the exercise of the powers, functions or performances of public officials or representatives. If the doctrine of qualified privilege is to serve its purpose, however, much latitude must be given to statements that are ostensibly made on an occasion of qualified privilege. It is well settled that malice should not be inferred because of the use of extravagant language on such an occasion (*Calwell v. Ipec Australia Ltd.* [1975] 135 CLR 321 at 332-333). Similarly, the privilege should not be lost because of the irrelevance of some statements or, in a case depending on the special knowledge of the publisher, because the defamatory material is largely comment. But here the defamatory imputations arise from defamatory comment and the basis of that comment is not disclosed except in one comparatively minor aspect.

The trip of the plaintiffs is described as "a Mammoth Junket", "a junket of mammoth proportions". Mr Lockyer is said to have claimed that the plaintiffs "had gone on a junket at taxpayer's expense without parliament's knowledge". The plaintiffs are said to have "gone in secret". Mr Lockyer is reported to have "accused all involved of sneaking off in secret". The trip is said to be "nothing but a rort". The Council President is claimed to have "a lot of answering to do". If "the electors knew what was up, they'd be appalled." Mr Lockyer is reported to have said that the "affair made him cringe with embarrassment." These statements, so far as they give rise to defamatory imputations are comment, not fact.

The statement that the plaintiffs had gone on the trips "without Parliament's knowledge" appears to be the basis of the claim that the plaintiffs had gone in secret. To that extent the article provides the basis for the comment that the plaintiffs had gone in secret. If that comment is defamatory of the plaintiffs, it is protected by the doctrine of qualified privilege, no matter how unfair the comment may be. But that is only a small part of the articles. There is no information to explain why the trip is a "junket", a "mammoth junket" or "a rort". There is no information to justify the comment that the plaintiffs were involved in "sneaking off" in secret. Nor are the electors informed of the matters which would make them "appalled" if they "knew what was up".

In my opinion, Mr Lockyer had no duty for the purpose of the law of qualified privilege to publish these comments and opinions to the general public. Furthermore, the public had no duty or interest in receiving what is essentially bare defamatory comment unaccompanied by explanatory statements of fact. If the statements of Mr Lockyer are protected, they are protected by the defence of fair comment or justification, but not by the defence of qualified privilege.

Accordingly, quite apart from its technical deficiencies, the defence pleaded in paragraph 20B is bad in law.

The questions in the case stated should be answered:

(a) Yes.

(b) Yes.